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British Columbia

1991

Report on Apartment Corporations

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

APARTMENT CORPORATIONS

(MINOR REPORT)

LRC 120 May, 1991

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TO THE HONOURABLE RUSSELL G. FRASER
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA

Dear Mr. Attorney:

Re: Apartment Corporations
(Minor Report, LRC 120)

This Report concerns the legal framework which provides a form of apartment ownership in many older buildings in the province. Work in this area was undertaken by the Law Reform Commission at the request of the Ministry of Finance and Corporate Relations. The Report concludes that, with one exception, no action is called for at this time.

Yours sincerely,

A Close

Arthur L. Close, Q.C.
Chairman

May 16, 1991

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PART I – GENERAL CONCLUSIONS

A. Background: Apartment Corporations

The desire to create "self-owned" apartments within a larger structure is an old one,[1] but it is only within the last 25 years that the law has responded, in a comprehensive way, to meet this desire. This response takes the form of modern condominium legislation first enacted in British Columbia in 1966.[2] Before the *Condominium Act*, a variety of techniques were employed to achieve the goal of apartment ownership. A feature common to all of these techniques was the creation, by private agreement, of a web of rights and obligations between the "owners" of the various individual apartments.[3]

The most familiar kind of arrangement used in this province before the coming of condominium legislation involved the creation of a corporation to hold the legal title to the building in which the individual dwelling units were located. Each "owner" would be a shareholder in the corporation and the right to occupy a particular dwelling unit would arise under a long-term lease between the owner and the corporation. These are referred to in this Report as "apartment corporations."[4]

Significant numbers of apartment corporations continue to exist in British Columbia[5] and for many who live in them they constitute a distinct and highly desirable alternative to condominium living. So far as new construction is concerned,[6] however, they have clearly been eclipsed in popularity by the condominium form of organization.

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1. *See generally* Pavlich, *Condominium Law in British Columbia*, 28 (1982).
2. *Strata Titles Act*, S.B.C. 1966, c. 46. It is now titled the *Condominium Act*.
3. A characteristic feature of the *Condominium Act* is that it imposes rights and obligations as a matter of general law rather than agreement.
4. The expression "apartment corporation" has been adopted in preference to another term which is, perhaps, used somewhat more widely: "cooperative." The difficulty is that "cooperative" is also used to refer to a different type of multiple unit housing tenure which is not of concern in this study and it is desirable that they are not confused (the other kind of "cooperative" is non-market housing, usually subsidized in some fashion, in which the members do not profit from any increase in the value of the land and building involved).
5. It is estimated that there are approximately 5500 dwelling units of this kind in the province.
6. An apartment corporation kind of arrangement may continue to be used in conjunction with the *Condominium Act* for certain kinds of recreational developments.

B. Origins of This Study

The Law Reform Commission's involvement with a project on apartment corporations grew out of work being carried out by the Ministry of Finance and Corporate Relations (MFCR).[7] In October 1990, that Ministry distributed a *Discussion Paper on the Condominium Act* which outlined proposed changes to it.[8] The MFCR's Discussion Paper touched on a variety of issues and included a number of observations concerning apartment corporations.[9]

These observations included a concern that "problems have arisen with the operation ... [of apartment corporations] ... and this has led to situations in which the rights of individual owners have been open to abuse." The MFCR suggested partial or total assimilation of apartment corporations to condominiums as one approach to addressing this perceived problem, and the Law Reform Commission was asked to take this matter in hand and provide advice.

C. Research and Consultation

One of the first steps on initiating this study was to attempt to gather information concerning the state of corporate apartment ownership and the perceptions that surround it. At an early stage, the Commission's interest in apartment corporations became known within the real estate industry and communications were received from a number of individuals working within it. These preliminary communications suggested that concern over abuse of the rights of individual owners was misplaced. There was, however, a good deal of interest in the assimilation or conversion of apartment corporations to condominiums as an end in itself.

Accordingly much of the Commission's research focused on ways of making the legal structure of apartment corporations simpler and more understandable. It also attempted to identify

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7. That Ministry is responsible for administering the *Condominium Act* and it is currently engaged in a broad review of the Act and its operation. Such a review is timely since the Act has not undergone a major revision for almost 15 years.

8. Ministry of Finance and Corporate Relations, *Discussion Paper: Amendments to the Condominium Act* (1990).

9. The observations on apartment corporations contained in the Ministry of Finance and Corporate Relations' *Discussion Paper on the Condominium Act* are set out, in part, as Appendix A to this Report.

impediments to conversion which might be mitigated. This research led to the development of a number of tentative proposals for changes in the law.[10] These were set out in a Report for Discussion issued late in January 1991 which was distributed for discussion and comment to, what we hoped were, a representative group of apartment corporations and other interested persons.

The proposals made in the Report for Discussion attracted a number of very positive comments. They also, however, attracted a surprising number of adverse responses. Most of the latter were from individual unit owners who viewed with hostility and alarm the prospect of conversion of their dwellings to condominium status. Nothing in the Commission's tentative proposals suggested that conversion should occur unless that was the wish of a majority of owners. Nonetheless, proposed measures aimed only at facilitating conversion were perceived by many as threatening although the reasons for this perception were not always well-articulated.

D. Conclusions

Concerns were originally raised within the Ministry of Finance and Corporate Relations that the apartment corporation form of ownership left the rights of owners open to abuse. That led to this matter being referred to the Law Reform Commission. Nothing in the submissions made to us (by persons holding widely divergent views on other issues in relation to apartment corporations), or in our own research, suggests that the actual or potential abuse of owners' rights is a problem.

The response to the Report for Discussion did reveal a number of instances of conflict between individual apartment owners and the elected boards of their corporations. It cannot, however, be said that such conflicts are peculiar to their form of ownership. Most are essentially "people problems" which would arise whatever legal framework regulated their ownership. It may be true that some owners have less flexibility than they would like in dealing with their property, but that is an inherent characteristic of this kind of ownership.

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10. A summary of the tentative proposals made in the Report for Discussion are set out in Appendix B to this Report.

Even if abuse is not a sufficient justification for legal change, there remains the question whether facilitating conversion, for those who wish it, is a worthwhile end in itself. The response to the proposals made in our Report for Discussion makes it clear that this is a question on which widely opposing views are passionately held. The merits of any reform measures brought forward are difficult to assess in the light of the highly charged atmosphere which surrounds their debate. We continue to believe that the proposals made in the Report for Discussion represent sound legal policy. At the same time, we cannot say with confidence that the benefits which would flow from their implementation outweigh the very real distress that would be suffered by a significant number of owners who would see such measures as threatening their homes and a cherished lifestyle.

It is our conclusion that the enactment, at the present time, of any comprehensive measures to facilitate the conversion of apartment corporations or condominiums would be premature. The demographics of apartment ownership are changing and we suspect that in 10 or 15 years the issues surrounding conversion will come to be viewed in a somewhat different light. While this topic might be revisited after an appropriate lapse of time, we recommend that, with one exception,[11] no legislation be enacted to facilitate the voluntary conversion or assimilation of apartment corporations to condominiums.

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11. The exception concerns s. 9 of the *Condominium Act*. This issue is discussed in Part II of this Report.

PART II – LOCAL GOVERNMENT POWERS

A. *Condominium Act*, Section 9

The *Condominium Act* deals expressly with the conversion of existing buildings to condominium status. Section 9 provides:

> **9.** (1) On the conversion into strata lots of a previously occupied building by an owner developer, the approving authority may approve the strata plan, refuse to approve the strata plan or refuse to approve the strata plan until terms and conditions imposed by the approving authority are met. The decision is final.
>
> (2) The approving authority shall not approve the conversion unless the building substantially complies with the applicable bylaws of the municipality, or, where the building is not situated within a municipality, substantially complies with the National Building Code of Canada issued by the Associate Committee on the National Building Code, National Research Council, as amended from time to time, and with any other bylaws that may apply to the building.
>
> (3) The approving authority shall consider, in making its decision,
>
> (a) the priority of rental accommodation over privately owned housing in the area;
> (b) the proposals of the owner developer for the relocation of persons occupying the building;
> (c) the life expectancy of the building; and
> (d) projected major increases in maintenance costs due to the condition of the building.
>
> It may consider any other matters that, in its opinion, are relevant.
>
> (4) For the purposes of this section, "approving authority" means, in a municipality, the municipal council, or outside a municipality, the regional board of the regional district in which the land is situated.
>
> (5) The approving authority shall, at the time of approval, issue a certificate in the form prescribed and the certificate shall be filed with the registrar on deposit of the strata plan.

Section 9, essentially, requires that any conversion have the approval of local government (the "approving authority").

The "approving authority" under section 9 would appear to have a wide discretion to refuse to approve a conversion, although some guidelines are provided in subsection (3). An important limitation on the discretion of the approving authority is set out in subsection (2). A conversion cannot be approved unless it "substantially complies with the applicable bylaws of the mu-

nicipality." This is generally regarded as a reference to building and construction standards.

It is our understanding that meeting the requirements of section 9 is often the single most significant impediment to conversion. Many buildings constructed in the 1950's and 60's were built to standards which fall significantly short of those which would be required today of a new building. Large numbers of apartment corporations fall into this category. Altering these old buildings so that they conform to today's more exacting standards could be prohibitively expensive.

Examples provided to us were essentially anecdotal, but do serve to reinforce this point. Areas in which the "approving authority" might require upgrading as a condition of approving a conversion were said to include the provision of additional off-street parking, elevator installation, and "earthquake proofing."

B. Application of Section 9 to Apartment Corporations

Is the continued application of section 9 of the *Condominium Act*, with its requirement of local government approval, justified? A historical review is instructive. Legislation regulating the conversion of existing buildings to condominiums dates from the early 1970's. Throughout the past two decades, the shrinking supply of rental housing has been a concern of both the provincial and local governments. A particular concern which arose in the 1970's was the purchase, by developers, of existing apartment blocks occupied by tenants. These would be converted to condominiums and, in the process, those tenants who did not wish to purchase their apartments would be dislodged.

Section 9 was a response to those concerns. This seems evident from the guidelines listed in subsection (3) which require that the approving authority consider "the priority of rental accommodation" and "proposals...for the relocation of persons occupying the building." It is doubtful if the legislators ever saw the conversion of apartment corporations to condominiums as posing any kind of threat. Nonetheless, section 9 was drafted in a way which catches those conversions and makes them subject to the approval of local government. Whether this was deliberate, or simply an oversight, is difficult to say.

Section 9 probably still serves a useful purpose in preserving stocks of rental housing, but the merits of its application to conversions from apartment corporations is less obvious. There may be some more general interest of local governments which is served by a power to compel property owners to upgrade in particular circumstances. Presumably this might allow a city or municipality to enhance its property tax base. It might also be seen as a way of protecting its citizens from housing which had become unsafe. The same justification, however, might be raised to compel those who hold property in a variety of different ways to upgrade their property. What justification is there for singling out this one type of property holding, the apartment corporation seeking to alter its legal form, for upgrading?

It must be remembered that many, perhaps the majority, of apartment corporations were formed at a time when there was no *Condominium Act*.[12] Members of apartment corporations formed in those circumstances who wish to move to a condominium form of legal structure should not be penalized. In many cases, they only wish to do what would have been done initially if the law had permitted it. It is easy to envisage two buildings comparable in size and location, each constructed a few months apart in 1966. The units of the first building are sold to individual owners through the medium of an apartment corporation. Units in the second building are sold as strata lots under the *Strata Title Act* which had just come into force. Both buildings were constructed to the same standards, but neither would meet today's building codes. If the owners of the first building wish to place their ownership on the same footing as the owners of the second building, why should they be obliged to engage in a costly upgrading of the building? What they appear to be paying for is the failure of the law to provide an appropriate framework for ownership at the time the apartment corporation was formed.

It is the Commission's view that section 9 of the *Condominium Act* should no longer operate, with full vigour, to regulate conversions from apartment corporations to condominiums. Whether or not conversion should take place is a matter for the unit owners only to decide – the interest of local governments in regulating it is minimal. It is suggested that section 9 be

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12. Or when the strata title concept was still regarded as something of an unproven novelty.

amended so that most conversions from apartment corporation to condominium are exempted from its operation.[13]

13. One problem with a total exemption is that it might be used as a loophole through which a rental housing conversion can be affected while avoiding the impact of section 9. For example, a developer might first convert from rental housing to apartment corporation and then from apartment corporation to condominium (although the marketing of the units converted from rental housing would be prohibited under section 50(5) of the *Real Estate Act* unless the consent of the local government to that conversion had been obtained). One approach to plugging that loophole would be to exempt only those corporations formed before a certain date.

APPENDIX A

Extract from

MINISTRY OF FINANCE AND CORPORATE RELATIONS
DISCUSSION PAPER
AMENDMENTS TO THE *CONDOMINIUM ACT*
"APARTMENT CORPORATIONS"

There are a number of cooperatively owned apartment buildings in the province which do not fall under the *Condominium Act* but, rather, operate as companies under provisions of the *Company Act*. These apartments were built prior to the enactment of condominium legislation and were organized along corporate lines.

Recently, a number of problems have arisen with the operations of these apartments. Housing market conditions have resulted in the rapid escalation of the value of these properties and this has led to situations in which the rights of individual owners have been open to abuse. The question has arisen as to whether the *Company Act* provides an appropriate means of corporate organization for these apartment buildings.

...

In recognition of the technical and legal complexity of this issue, it has been referred to the Law Reform Commission of British Columbia for consideration and advice.

APPENDIX B

LAW REFORM COMMISSION OF BRITISH COLUMBIA

DISCUSSION DOCUMENT

The Report for Discussion which was distributed for comment explored a number of suggestions for possible law reform measures. They included:

1. an examination of the ways in which the law might facilitate the conversion of apartment corporations to condominiums through limiting the application of Section 9 of the *Condominium Act* [see PART II of this Report] and altering "supermajority" requirements in relation to a decision to convert.

2. encouraging the development of a "model" set of bylaws, drafted in plain language, for adoption on a voluntary basis, so that the rights and obligations of members and apartment corporations are made more accessible and understandable.

3. encouraging the wider use of arbitration procedures to resolve differences that may arise in relation to conversion or the transfer of apartment ownership.